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RECENT AMERICAN DECISIONS.

Circuit Court of the United States, Massachusetts, October Term, 1839, at Boston.

WILDES AND OTHERS v. SAVAGE.

By the law of England it seems, that a promise to accept a non-existing bill of exchange, even though it is taken by the holder upon the faith of that promise, does not amount to an acceptance of the bill, when drawn in favor of the holder.

But it has been held otherwise by the supreme court of the United States. However, if the bill is payable after *sight*, and not *after date*, such a promise to accept has never been held in either country to be an acceptance of a non-existing bill.

Where a bill is negotiable and contains a drawer, a payee, and a drawee, it is, in a commercial sense, a bill of exchange, although one or more of the parties should fill a double character; and it is of no consequence what particular individuals represent the dramatic personages.

Upon a guaranty for future advances, it is the duty of the party making the advances, to give notice to the guarantor of his acceptance thereof, and his consent to act under the guaranty, and to make the advances. But this doctrine does not apply where the agreement to accept is contemporaneous with the guaranty.

Where a guaranty is accepted and notice has been duly given to the guarantor, that the party will act upon it, all that is universally required of the person making the advances or giving the credit, is, to make a demand upon the debtor, when the credit has expired, or the amount become due, and upon his default, to give notice thereof within a reasonable time afterwards to the guarantor; although in some cases it may be necessary to give a distinct notice to the guarantor, when the transaction has been completed, of the amount of the advances actually made and the terms, upon which they have been made.

Upon a guaranty, to discharge the guarantor, there must not only be a want of notice of the default of the debtor within a reasonable time, but there must also be some loss or damage sustained by the guarantor.

Under the peculiar circumstances of this case, it was held, that due and sufficient notice was given, and that the guarantor was liable on his guaranty.

ASSUMPSIT on a guaranty. The case came on to be heard upon a statement of facts, agreed by the parties, in substance as follows:

The plaintiffs are bankers, doing business in London and in Boston. Samuel Austin, Jr. is their agent and attorney.

In June, 1836, James S. Bruce, a merchant of Boston, applied to Mr Austin for a credit upon the plaintiffs for two thousand pounds sterling, which said Austin agreed to issue, in behalf of the plaintiffs, upon condition, that the goods, purchased with the proceeds, should be consigned

to the plaintiffs, and that, in addition thereto, as a further security, said Bruce should furnish a personal guaranty to the amount of five hundred pounds sterling. The defendant agreed to become such guarantor, and thereupon said Austin gave to said Bruce a letter of credit for the sum aforesaid, on behalf of the plaintiffs, dated June 7, 1836, to be drawn for on account of said Bruce by Joseph Tuckerman, Jr., then about to proceed to the East Indies, or in his absence by the house of Russell & Co., of Canton.

Upon the letter of credit, Bruce, by an indorsement in writing, promised to place the plaintiffs in funds to cover the drafts with a banker's commission, interest, charges, &c. or settle the same in Boston. And the defendant, by another indorsement in writing, guarantied to the plaintiffs a punctual fulfilment of Bruce's agreement, to the extent of five hundred pounds sterling, promising, in case of his default, to pay that amount on demand to the order of the plaintiffs.

Joseph Tuckerman proceeded to the East Indies soon after the date of the letter of credit. On the 28th of November, 1836, Bruce became insolvent and executed a general assignment pursuant to the statute of Massachusetts of 1836. The defendant became a party to the assignment on the day of its date, and received dividends, on the 1st of July, 20 per cent.; in October, 1837, 15 per cent. and on September 3d, 1838, 10 per cent.; but he has never made any claim on account of the said guaranty. On the 25th of April, 1837, Russell & Co., in the absence of Tuckerman, drew on the faith of said letter of credit and for account of said Bruce, a bill on the plaintiffs for two thousand pounds sterling, payable to the order of the plaintiffs at six months sight. The said bill was in part payment of a shipment of teas made by said Russell & Co. to Boston, for account of said Bruce, and consigned to the plaintiffs. Russell & Co. remitted the bill directly to the plaintiffs, and being then indebted to them, the said bill was received by the plaintiffs on or about October 6, 1837, and passed to the credit of Russell & Co., in account current. On the 25th day of June, 1837, the plaintiffs suspended payment, and after that day declined accepting all bills drawn under letters of credit, heretofore granted by said Austin. Their failure and refusal to accept bills were publicly known in Boston about the 15th of July, 1837, and the defendant, who is conversant with such matters, had knowledge thereof on or soon after that day.

On the 2d of May, 1836, Austin, as agent aforesaid, gave to Bruce another letter of credit, upon which the defendant entered into a guaranty of the same date. A bill was drawn under this last mentioned letter, and on presentment thereof to the plaintiffs in London, they refused acceptance thereof, and wrote to Bruce a letter under date of June 29, 1837. This letter was received by Bruce on or about the 9th of August, 1837, and its contents were made known by Bruce to the defendant in the course of a few days after its receipt.

The teas purchased with this bill were received in Boston by Mr Austin, as the attorney of the plaintiffs, about August 28, 1837.

On October 6, 1837, the plaintiffs notified to Mr Bruce by letter, that Russell & Co. had drawn on them for £2000, under said letter of credit and that said bill would fall due on the 8th of April, then next, and requested him to provide for its payment with their partner in New York or their agent in Boston. On the 5th of September, 1837, Bruce exe-

cuted to Russell & Co. an assignment of all his interest in the teas then in the hands of Austin, which assignment was procured in Boston by Mr Forbes to secure Russell & Co. in case the plaintiff should not accept and pay the said draft of £2000.

On the 5th of May, 1838, Mr Austin made a formal demand on Mr Bruce for the fulfilment of his engagement, stating that he had received intelligence, that the bill had been received and passed to the credit of Russell & Co. by the plaintiffs. To this letter Mr Bruce made no answer. On the 13th of October, 1838, Mr Austin repeated that request by letter to Mr Bruce, to which Mr Bruce made no answer; in which last letter Mr Austin notified to Mr Bruce, that he should, after the Monday following, sell the teas, holding him and the defendant accountable for the deficiency, if any.

The teas were afterwards sold from time to time by Mr Austin, who remitted the proceeds to the plaintiffs in London; and on making up the account it appeared, that they fell short of the amount due the plaintiffs by the sum of £728. The last parcel of the teas was sold in January, 1839; and Mr Austin, on the 4th of March, notified to Bruce, that he had received the account from the plaintiffs showing that deficiency.

In the autumn of 1838, Mr Austin verbally notified to Mr Savage, that the teas were on sale, and would probably leave a deficiency of more than £500, for which the plaintiffs would look to him upon his guaranty, to which Mr Savage replied in terms neither admitting nor denying his liability. On the 11th of March, 1839, Mr Austin received from the defendant, a letter, dated March 9, stating that the plaintiff's account had been shown to him by Bruce at Mr Austin's request, but denying any right of claim against him, the defendant. To which Mr Austin replied on the 11th of March, making a formal demand on the defendant for the deficiency. To this demand Mr Savage replied on the 12th of March, reiterating his denial of the claim.

Russell & Co. received full payment of the bill from the plaintiffs in account current. Bruce was insolvent at the maturity of the bill, and continued to be so until the present time as to all debts contracted before his assignment; and this suit is brought to recover the £500 and interest upon the guaranty of the defendant.

If the law of England in respect to a promise to accept a non-existing bill shall come in question, either party may read the deposition of Sir Frederick Pollock and Mr Hill as evidence of the foreign law, if the court shall consider the depositions of English lawyers competent evidence in this court of the common law of England.

The whole case is submitted to the court upon the law and facts, with authority to draw such inferences as a jury would be justifiable in drawing from the facts as stated.

The case was argued by *F. Dexter* for the plaintiffs, and by *Charles P. Curtis* and *B. R. Curtis* for the defendants.

STORY J.—Several points have been suggested at the argument, upon some of which I do not entertain any doubt; and, therefore, they may be disposed of in a few words. It is said, that by the law of England, where the bill of exchange, drawn in this case, was to be accepted, and to be payable, a promise to accept a non-existing bill,

even though the bill is taken by the holder upon the faith of that promise, does not amount to an acceptance of the bill when drawn in favor of the holder. The opinions of Sir Frederick Pollock and Mr Hill, who are admitted, on all sides, to be very eminent counsel, taken under commission, are direct and full to the point, and leave no doubt as to the present state of the law in England, although certainly it was formerly a matter of no inconsiderable controversy. The language of Lord Mansfield, in *Pillans v. Van Mierop*, (3 Burr. R. 1663,) and *Pierson v. Dunlop*, (Cowper R. 571,) and *Mason v. Hunt*, (Doug. R. 296,) certainly went very far to establish the contrary doctrine in its full latitude, although it was somewhat shaken but not directly overturned, in the subsequent case of *Johnson v. Collings*, (1 East R. 98.) It was in this state of the authorities that the question was first presented to the supreme court of the United States, in the case of *Coolidge v. Payson*, (2 Wheat. R. 66 ;) and upon the footing of the cases before Lord Mansfield, it was then held, that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person, who afterwards takes the bill upon the credit of the letter, a virtual acceptance, binding the person, who makes the promise. To this doctrine thus limited, the supreme court have ever since steadily adhered, whenever the question has (as it has on several occasions) since come before it. But on the other hand, the court has shown a strong disinclination in any respect to enlarge the doctrine of a virtual acceptance of non-existing bills.[1] It is, perhaps, to be lamented, that the doctrine of such virtual acceptances ever was established ; and if the question had been entirely new, I am well satisfied, that it would not have been recognized as fit to be promulgated by that court, it being at once unsound in policy, and full of inconvenience. But the supreme court yielded as did the judge, who decided that case in the circuit court, to what seemed, at that time, the true result of the English authorities upon an important practical commercial question. I am not sorry to find, that professional opinion has now settled down in England against the doctrine ; although there is no pretence to say, that up to this very hour, there has been any formal decision in Westminster Hall against it. But it does not appear to me, that the doctrine ever was applicable or could be applied to any bills of exchange, except such as were payable on demand, or at a fixed time after date. Where bills are drawn payable at so many days after sight, it is impracticable to apply the doctrine ; for there remains a future act to be done, the presentment and sight of the bill, before the period, for which it is to run and at which it is to become payable can commence, whether it be accepted or be dishonored. How can the time be calculated upon such a bill before it is presented ? If a letter is written promising to accept a non-existing bill, to be thereafter drawn at six months sight,

[1] *Schimmelpinnich v. Bayard*, (1 Peters R. 264.) *Boyce v. Edwards*, (4 Peters R. 121.)

when is the acceptance to be deemed made? At the date of the bill? Certainly not; for that would be at war with the obvious intent of the parties, which plainly is, that the acceptance shall be on a future sight of the bill. If it is said, that the acceptance is to be treated as made, when the bill is actually presented for acceptance, and it is dishonored by the drawee, it is as plain, that we set up a prior intent or promise against the fact. Upon what ground can a court say, that when a party promises to do an act *in futuro*, such, for example, as to accept a bill, when it shall be drawn and presented to him at a future time, that his promise overcomes his act at that time? That his refusal to perform his promise amounts to a performance of it? It is quite another question, whether the holder, who has taken such a bill upon the faith of such promise may not have some other remedy, either at law or in equity, for the breach of it, against the promissor. My judgment is, that the doctrine of a virtual acceptance of a non-existing bill, by a prior promise to accept it when drawn, has no application to a bill drawn payable at some fixed period after sight; for it then amounts to no more than a promise to do a future act. I have looked into the authorities; and I do not find in any one of them, that the bill drawn, and to which the doctrine was applied, was a bill drawn payable at or after sight.

Upon another point I have still less doubt; and that is, that the bill of exchange, drawn in this case, was a draft within the scope of the letter of credit, and in conformity to the authority therein given. The argument is, that the bill is not a regular bill of exchange, because it is drawn by Russell & Co. payable to Wildes & Co., who are the drawees of the bill. In point of fact it was so drawn by Russell & Co. for the purpose of being passed to their credit by the drawees, to whom Russell & Co. were then indebted in a larger amount. It appears to me, that this does not change its character as a bill of exchange. An instrument is not less a bill of exchange, because all the parties to it in the character of drawers, payees, and drawees are not different persons. A bill drawn by a person, payable to his own order, has always been deemed to be a bill of exchange in the commercial sense of the phrase. And it would not cease to be such a bill, if it should be indorsed by the drawer payable to the drawee. Now, such a bill so indorsed differs in nothing substantially from the present bill. In truth, where the bill is negotiable, and contains a drawer, a payee, and a drawee, it is, in a commercial sense, a bill of exchange, although one or more of the parties should fill a double character. It is of no consequence, in such a case, what particular individuals represent the dramatic personages. Bills of exchange, so called, have sometimes been drawn by the drawer upon himself, payable to himself or order; and they have been held valid after indorsement by him to another person. But, at all events, the present is a "draft" in the sense of the letter of credit; for the word draft is *nomen generalissimum*, and includes all orders for the payment of money drawn by one person on another.

The remaining point is that alone, upon which any difficulty can be

entertained. It is, whether the plaintiffs (Wildes & Co.) have lost their recourse over against the defendant upon his guaranty, by their omission to give him notice at an earlier period, of the neglect of Bruce to pay the money due according to his engagement upon the bill for £2000. And, here, it is important to advert to the dates of some of the material transactions. The letter of credit was given on the 7th of June, 1836. Bruce became insolvent and made a general assignment of his property on the 28th of November, 1836, and the defendant became a party to that assignment on the day of its date. The bill of exchange was drawn by Russell & Co., at Canton, on the 20th of April, 1837, at six months sight. The plaintiffs (Wildes & Co.) suspended payment on the 2d and 5th of June, 1837. The bill was remitted to them by Russell & Co., and was received by the plaintiffs and passed to the credit of Russell & Co. about the 6th of October, 1837, the latter being then indebted to the plaintiffs in a larger amount. On the same 6th of October, 1837, the plaintiffs duly notified to Bruce the receipt of the bill, and that it would fall due on the 8th of April, 1838, and requested him to provide for the payment thereof accordingly. No provision was made by Bruce for the payment of the bill at its maturity. On the 5th of May, 1838, Austin, as agent of the plaintiffs, made a formal demand on Bruce for the fulfilment of his engagement, and stated to him, that the bill had been received and passed to the account of Russell & Co. by the plaintiffs. Bruce made no reply. Afterwards in December, 1838, Austin gave notice to Bruce of his intention to sell the teas, which were held by him as security for the payment; and the teas were accordingly sold and the sales completed in January, 1830. In the autumn of 1838, probably in October, Austin notified to the defendant, that the teas were on sale, and would probably leave a deficiency beyond the £500, for which the plaintiffs would look to him upon his guaranty. The defendant replied in terms neither admitting nor denying his liability. A formal demand was afterwards made in March, 1839, upon the defendant, for the amount of his guaranty, which he declined paying; and the present suit has been since commenced therefor.

It is upon this posture of the substantial facts (for I omit any reference to others, which have not, in my judgment, any bearing upon the merits of the present case) that the question arises, whether the plaintiffs are entitled to recover, no notice of the default of Bruce having been given to the defendants, until the autumn of 1838.

It was said at the argument, that in cases of guaranty of future advances, to be made to another person, notice must be given to the guarantor by the party making the advance, that he accepts the guaranty and consents to make the advances; and also notice, that he has made the advances and acted upon the guaranty; and, lastly, notice, that he has made a due demand upon the debtor, and his refusal to pay the amount when due. The two former, it is added, are conditions precedent to the legal operation of the guaranty; and if not

duly given, the guarantor is not bound by his guaranty, whether he suffers any damage or not. The notice of the non-payment, it is admitted, is not a condition precedent; but it must be given in a reasonable time, and if the guarantor suffers any damage from the default of the creditor, he will, at least, to the extent of that damage, be exonerated.

I admit, that upon every guaranty for future advances, it is the duty of the party making the advances, to give notice to the guarantor of his acceptance thereof and of his consent to act under the guaranty, and to make the advances. This is conclusively established by the decisions of the supreme court in *Russell v. Clark*, (7 Cranch. R. 69.) *Edmondston v. Drake*, (5 Peters R. 624.) *Douglas v. Reynolds*, (7 Peters R. 113.) *Lee v. Dick*, (10 Peters R. 482.) *Adams v. Jones*, (12 Peters R. 207,) and *Reynolds v. Douglas*, (12 Peters R. 497.) This doctrine, however, is inapplicable to the circumstances of the present case, for the agreement to accept was contemporaneous with the guaranty, and indeed constituted the consideration and basis thereof. And at all events, here there was due notice of an agreement to give the credit and to make the advances contemplated by the guaranty.

Upon the other point, I have more difficulty in yielding to the argument. Where a guaranty is accepted and notice has been duly given to the guarantor, that the party will act upon it, and give credit and make advances accordingly, I am not aware, that it has ever been held, that it was indispensable in all cases to give another and a further distinct notice to the guarantor of the amount of the advances actually made, and the terms, upon which they have been made, when the transaction is completed. All that I have supposed to be universally required of the person making the advances or giving the credit, after having given due notice of his acceptance and intention to act upon the guaranty, is, to make a demand upon the debtor, when the credit has expired, or the amount become due, and upon his default to give notice thereof within a reasonable time afterwards to the guarantor. There is no case to my knowledge, which goes the length, that there should be three substantive or distinct notices in all cases, as contended for at the argument; and, as an original question, I should not be disposed to entertain it; since it would throw such arduous duties on the guarantee, (as I desire to call the party accepting the guaranty,) as would materially tend to impair the utility and convenience of that instrument. I do not mean to say, that there are not, or may not be particular cases of guaranty, in which such notice may be required. Thus, for example, in such a case as *Cremer v. Higginson*, (1 Mason R. 323,) where advances were contemplated upon certain future contingencies, which might or might not arise, it might be proper to hold, that some notice should be given to the guarantor within a reasonable time, (notwithstanding he had already signified in general terms a willingness to make the advances, if they should be required,) that the contingencies had arisen, and the advances had been made,

and the guaranty was relied on ; for otherwise the guarantor might not definitely know, whether, under such circumstances, the guaranty was acted upon or not. So in the case of *Douglas v. Reynolds*, (7 Peters R. 113, 127,) where there was a continuing guaranty for advances, acceptances and indorsements to be made by the party *in futuro*, it would seem but reasonable, that when the whole transactions are closed, notice of the whole amount, for which the guarantor is held responsible, should be communicated to him within a reasonable time afterwards. The same rule might well apply to a single transaction, such as a single advance, or acceptance, or indorsement, where from the nature and objects of the guaranty, the guarantor could not otherwise have any means of knowing the extent of his guaranty as to time, amount, or other particulars, essential to guide his future conduct, and to ascertain and fix his responsibility. All such cases must stand upon their own circumstances ; and do not seem to furnish just grounds for a general rule. But, without saying, what is or ought to be the general rule, it seems to me, that the doctrine can never properly apply to a case circumstanced as the present, where all the persons are originally privy to the whole transaction ; where the case rests upon a letter of credit for a limited amount, to be drawn within a fixed time, and, subject to these restrictions, where the sums for which the drafts are to be drawn, and the times when drawn, are to depend upon the action of the debtor, and the guarantor is a party to the whole of the original contract. In such a case the guarantor has as good means of knowledge and inquiry, as the guarantee, and it is quite as much his duty to make such inquiries, as it is of the guarantee to give him notice of the subsequent facts. If he omits to make any inquiries, he may properly attribute any loss, which he may sustain thereby, to his own laches, or want of vigilance, or to his own confidence in the debtor, and not to any disregard of duty on the other side. In the present case, it is impossible to avoid seeing, that the letter of credit was for a limited time (eighteen months) after which no advances made would bind the guarantor ; that the amount was not to exceed £2000 ; that all the bills were to be drawn in China at six months sight on London ; that the sole object of the letter of credit and advances was to assist the operations of Bruce in a projected enterprise or voyage from Boston to the East Indies and back ; that it was contemplated, that the bills would not become payable until a very long period after the time, when the guaranty was given ; that the return cargo was relied on, as the immediate fund, by which the advances were to be primarily secured ; and that the guaranty was to be merely an auxiliary security. It seems to me, that, under such circumstances, no further notice of the actual advances made was necessary to be given to the defendant, until the same became due from Bruce, and there had been some default on his part. The defendant, if he wished any information as to the progress or consummation of the voyage, could readily institute the proper inquiries. I am not prepared, therefore, to admit, that under the

circumstances of the present case, there was any duty on the part of the plaintiffs to give notice to the defendant of the fact of the bill of £2000 being drawn upon them and received by them and passed to the account of Russell & Co. before the maturity of the bill and the default of Bruce in not paying the same. If it had been the duty of the plaintiffs to give such notice, under such circumstances, I should still say, that it would not discharge the guaranty, unless the defendant could show, that he had suffered some damage from the want of such notice. Indeed, the rights and duties of parties to guaranties must, from the variety of circumstances, under which they have been entered into, be materially governed by the particular circumstances of each case. Lord Tenterden held this doctrine in *Van Wart v. Wooley*, (3 Barn. and Cresw. R. 439, 447,) to which I shall presently have occasion to refer for another purpose.

It appears to me, then, that the whole question in this case turns upon the point, whether the defendant has received notice of the default of Bruce and the non-payment of the bill within a reasonble time; and, if he has not, whether he is discharged from his guaranty, unless he has sustained some damage from the want of such notice. I take the doctrine to be clearly settled, that upon a guaranty, to discharge the guarantor, there must not only be a want of notice within a reasonable time, but there must also be some loss or damage sustained by the guarantor; and that if there be a loss or damage, that the guaranty is not totally discharged, but only *pro tanto* to the amount of the loss or damage. The case is constantly distinguished in the authorities from that of an indorser to negotiable paper. The latter is entitled to strict notice; the guarantor is entitled only to notice, when he is or may be prejudiced by the want of it. If the debtor is solvent when the money becomes due, and no notice is given to the guarantor, and the debtor afterwards and before notice becomes insolvent, the guaranty is discharged. But, where the notice would be of no avail, and the guarantor has suffered and can suffer no damage by the want of notice, he is not discharged by the omission to give it. Ordinarily, therefore, if the debtor is insolvent, when the debt became due, and has ever since remained so, no notice to the guarantor is deemed necessary; nay, not even a demand upon the debtor, when the debt became due.

This doctrine seems to me fully sustained by the leading authorities, beginning with the case of *Warrington v. Furbor*, (8 East. R. 242.) That case was fully recognized in *Philips v. Astling*, (2. Taunt. R. 206;) and the like doctrine was applied in *Holbrow v. Wilkins*, (1 B. and Cresw., 10) and *Van Wart v. Wooley*, (3 Barn. and Cresw. 439, 447). In this last case Lord Tenterden said, that in cases of guaranty the nature of the transaction, and the circumstances of the particular case were to be considered and regarded; and that, where the debtor had become bankrupt, a demand upon him was unnecessary to charge the guarantor. And in *Holbrow v. Wilkins*, and *Van Wart v. Wooley*, the court held, that as it did not appear, that the guarantor

had sustained any damage from the want of a due presentment to the debtor for payment, or of due notice to the guarantor of the default, the guaranty was not discharged. The same doctrine was maintained in *Gibbs v. Cannon*, (9 Serg. and Rawle, 202,) and pointedly asserted in the *Oxford Bank v. Haynes*, (8 Pick. R. 423.) It was also recognized to the fullest extent in *Reynolds v. Douglas*, (12 Peters R. 497.) And the court in effect there said, that the guarantor is bound, without notice, where the debtor is insolvent at the time, when the debt becomes due; and that his liability continues, unless he can show, that he has sustained some prejudice by the want of notice of a demand on the debtor and his non-payment; and, if he has sustained any damage, that he will be discharged only to the amount of that damage.

Now, upon these principles, it seems to me difficult to maintain the position, that the present defendant is not liable on his guaranty. Bruce (the debtor) became insolvent before the bill was drawn, and for aught that appears, he has remained ever since insolvent. The earliest period, in which it would have been practicable to have given notice to the defendant of the arrival of the draft and the acceptance by the plaintiffs must have been after the 6th of October, 1837; and the earliest period, at which notice could have been given of the default of payment, must have been after the 8th of April, 1838, when the draft was at maturity. It is not shown, nor as far as I know, even pretended in argument, that notice as soon as practicable after either of these periods, would have been of any advantage to the defendant, or that he has sustained any damage by the omission of such notice. The debtor then was, and as far we know, has ever since been insolvent, and without the means to discharge the debt. If this be so, then upon the general principles already stated, the defendant is not discharged from his guaranty.

But, it appears to me, that there are circumstances in the present case, which show, that the notice was within a reasonable time; and indeed, as early, if not earlier, than the case required. It is plain to me (as I have already intimated) that the understanding was, that the teas should be the primary fund or security for the payment of the debt; and until that fund was exhausted by a sale, and the actual deficiency was ascertained, I do not well see, how the defendant could be called upon to pay the sum due upon his guaranty. It would be an unliquidated deficiency. In a court of equity, at all events, the defendant would have been entitled to require, that the teas should first be sold and applied to the payment of the debt *pro tanto*, before he was called upon to pay the amount secured by his guaranty. Now in point of fact, in or about October, 1838, and before the sale of the teas, he had due notice of the advances and of the probable deficiency. He made no objection to the sale; he did not positively insist upon his being then discharged from the guaranty. The sales were not concluded until the succeeding January, and he had due notice thereof in a short period after the entire deficiency was ascertained.

Now, if I am right in this view of the facts, that the guaranty was not to be insisted on, until the other fund was exhausted, and the proceeds of the sales were first to be applied in discharge of the defendant, the demand was made upon the defendant within a reasonable time. It was made as soon as it properly could be. And it is not shown, that an earlier sale, if practicable, would have been desirable, or of any higher benefit to the parties.

Upon the whole, upon the best consideration, which I am able to give this case, the plaintiff is entitled to judgment for the amount of the guaranty, as well upon the special principles of law, as the general circumstances of the case.

Supreme Judicial Court, Massachusetts, March Term, 1840, at Boston.

TRYON AND ANOTHER v. WHITMARSH.

A false affirmation made by a person with intent to defraud another, whereby that other receives damage, is the ground of an action on the case.

THIS was an action on the case for an alleged fraudulent representation by the defendant, respecting the pecuniary credit of James & Whitney, by means of which the plaintiffs were induced to sell them goods on credit. The alleged fraudulent representation consisted of the following letter, which was addressed by the defendant to Lynde & Jennings, but which was shown to the plaintiffs before they gave credit to James & Whitney :—"Gentlemen : allow me to introduce to you Mr W. W. Whitney, of the firm of James & Whitney, successors to Staples & Nichols. Should he want to purchase goods in New York, you can recommend him with perfect confidence in being entitled to credit, and if my name should be required, he will explain the proposition I made to them."

At the trial before *Shaw C. J.*, the general rule laid down for the direction of the jury was, that if a man knowing, or having good reason to believe, that one is not entitled to credit, gives an assurance to another, that he is worthy of credit, and the party to whom the assurance is given, has acted upon the faith of it, and sustained loss in consequence of it, the party making such false assurances is liable to the other for the damage. That it is not necessary to prove that he had any fraudulent design to benefit himself or to injure the plaintiff; if there was falsity on the part of the defendant, and consequent damage suffered by the plaintiff, it was sufficient to support the action, and the law in such case presumed some illegal motive. But in applying this rule to the present case as to the motive, it was left to the jury to consider, if the defendant did not in fact believe, that James & Whitney were fully entitled to credit. In conclusion, the jury were told, that in order for the plaintiffs to recover, they must prove,

1. That the representation was made by the defendant. 2. That the plaintiffs trusted to it. 3. That they would not have given the credit without it. 4. That it was substantially false, and James & Whitney were not worthy of credit. 5. That the defendant knew all the facts upon which their title to be deemed of good credit rested. 6. That the plaintiffs lost their debt in consequence of the representation.

The jury returned a verdict for the plaintiffs, and the defendant moved for a new trial.

B. Sumner and *E. G. Austin* for the plaintiffs.

Choate and *Watts* for the defendant.

WILDE J.—The law on this subject was well settled in the leading case of *Pasley v. Freeman*, (3 T. R. 53), where it was held that a false affirmation made by a person *with intent to defraud another*, whereby that other receives damage, is the ground of an action upon the case in the nature of deceit ; and in such an action, it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is. Gross J., did not concur in this decision, although he afterwards in the case of *Haycraft v. Creasey*, (2 East. 91), considered himself bound by the authority of it ; and it has been repeatedly recognised as binding authority. The only question, then, in the present case is, whether the law was laid down to the jury with sufficient distinctness ; and the court are all of opinion, that the six propositions stated to the jury might have been found by them in favor of the plaintiffs, and yet the defendant not have been liable in the present action. The distinct question should have been passed upon by them, whether the defendant made a false statement fraudulently ; because unless he had a fraudulent intent he is not liable. As there is reason to believe that the jury did not understand the law fully upon this point, there must be a new trial.

FINNEY v. WARREN INSURANCE COMPANY.

Question in relation to the insurable interest of a part owner, in the whole vessel.

ACTION on a policy of insurance on the brig Hecla, of Plymouth, for $8000. From the agreed statement of facts, it appeared that the brig was built in 1834, by Elkanah Finney, who owned three eighths of her, his son, Josiah Finney, who owned one eighth, David Finney, Joseph Allen, Henry Whiting, and John Finney. Elkanah Finney died in 1837, and Josiah took out letters of administration on his estate. The latter also kept the accounts of the vessel, received the avails, made the disbursements and directed the voyages generally, from the time she was built.

In 1837, after the death of Elkanah, Josiah procured this policy of insurance, which was in the common form of Boston policies. In his application for insurance he did not state, nor did the defendants ask, who were interested in the vessel.

The plaintiff in this action claimed in one count of his writ to recov-

er for the entire loss. In another count he claimed to recover to the extent of his interest individually in one eighth, and, as administrator, three eighths.

Derby for the plaintiff.

Parsons for the defendants.

PUTNAM J.—In this case the defendants' council contends, that they are not liable at all on this policy, because the plaintiff had no insurable interest in the whole vessel, and that he cannot recover for the interest he actually had, because the insurance was upon the whole, and not upon a fractional part, and the defendants are liable for the whole or nothing. We think the case of *Page v. Fry*, (2 Bos. and Pul. 240), is a sufficient answer to this reasoning, where it was held that it was sufficient if the assured had an interest throughout the entirety of the cargo, notwithstanding other persons had a beneficial interest in a part. But that case does not go to the extent contended for by the plaintiff, namely, that one who is interested in a part of a vessel can recover for a total loss of the whole. The true doctrine is, that the plaintiff in the present case, may recover for what he actually owns, and also for what he represents as administrator, but for no more. He was the ship's agent for certain purposes, but his authority did not extend to procuring policies of insurance. In *French v. Backhouse*, (5 Burrows 2729), it was held that the ship's husband has no authority to insure it, without particular directions.

But in the present case, the policy by its terms did not include all the owners. The plaintiff caused *himself* to be insured and nobody else. For this reason if for no other, he cannot recover for more than he actually owned or represented as administrator.

The result is, that the plaintiff may recover for one eighth of the vessel which he owned, and for three eighths which he represented as the administrator of Elkanah Finney, and the case will, by the agreement of the parties, be sent to an assessor to ascertain the amount.

SHATTUCK v. FREEMAN.

Construction of the statute of Massachusetts of April 15, 1836, to regulate the assignment and distribution of the property of insolvent debtors.

TRESPASS by the plaintiff, as assignee of David Carver, against the defendant as a deputy of the sheriff of the county of Suffolk, for taking certain goods included in the assignment from Carver to the plaintiff, on a writ sued out by one John Wyman against the assignor, Carver. The assignment was made in conformity to the provisions of the statute of April 15, 1836.

At the trial, the defendant requested the judge to instruct the jury upon the following points, viz :

1. That the assignment was void as to the creditors and as to the plaintiff, because none of the creditors had become parties thereto prior to this attachment.

2. That the assignment was void, because the assignee delegated the trust reposed in him, and permitted the assignor to remain in possession and sell the goods and exercise acts of ownership, all of which was inconsistent with the provisions of the statute.

3. That the plaintiff permitted the assignor to remain in possession of the goods for the period of six months, without preparing to make a dividend, which was a virtual abandonment of the assignment by him, and an actual or constructive fraud on the creditors which vitiated the assignment.

4. That Carver paid certain creditors in full out of the assigned fund, while he was in possession as agent of the plaintiff, which was a direct fraud on the creditors, and *de facto* avoided the assignment as against them. But the judge refused so to instruct the jury, and they returned a verdict for the plaintiff, under the direction of the court. The defendant moved for a new trial.

E. G. Austin for the plaintiff.

Dexter and *G. W. Phillips* for the defendant.

DEWEY J.—The court are all of opinion, that the grounds taken by the defendant at the trial were incorrect, and that the verdict must stand. It is undoubtedly correct, that by the old assignment law, it was necessary for the creditors or some of them, to become parties to an assignment, or it was void; and this was one of the evils intended to be guarded against by the statute of 1836. By this statute the consent of no creditor is necessary to vest the property in the assignee. The assignment was well made, and binding upon all interested. Then, there is nothing in the acts of the assignee or the assignor, which goes to show that they abandoned the assignment. There is no valid objection to the assignee appointing the assignor his agent for the purpose of closing up the affairs of the concern. It is true, that he stands in the same light as any other agent; and if he paid some of the creditors in full, it was fraudulent, and the plaintiff is liable to make up whatever deficiency there may be on this account, in the payment of the other creditors' debts. But this does not affect the assignment or assist the defendant in the present case. Nor is negligence on the part of the assignee in declaring a dividend, any defence in the present action. The only remedy in such a case is given by the statute before referred to, by the seventh section of which it is provided that this court or the court of common pleas may, upon sufficient cause, remove the assignee and cause a just and prompt settlement of the estate.

The defendant also moves for a new trial because the damages awarded by the jury were excessive, but the court do not deem it necessary to interfere, and there must accordingly be

Judgment on the verdict.

GROSVENOR v. LLOYD.

A dormant partner is liable for the partnership debts only while the partnership actually continues.

ASSUMPSIT for the rent of a stable for thirtytwo days, from April 1, 1835. One Stone was also made a defendant, but no service was made on him. At the trial in the court below, it appeared that the defendant and Stone were formerly in partnership, but it was dissolved on the date above mentioned, although no notice was given to the plaintiff. The defendant offered evidence to prove that he was only a secret partner, and that the plaintiff never knew he was connected with Stone at all. The court instructed the jury, however, that the rent of the stable in which the copartnership business was carried on, was a fair charge against all the copartners; and even if the defendant was a secret partner he was liable with the other copartners for the rent; that if Stone, with the same sign over the door, and ostensibly in the same manner, occupied the stable after the first day of April, as he had done before, the plaintiff had a right to charge all the partners for the rent until he had notice of the dissolution of the copartnership.

The jury returned a verdict for the plaintiff, and the case came up on exceptions to the charge of the judge.

Field for the plaintiff.

Paine for the defendant.

SHAW C. J.—The instructions to the jury were clearly wrong. An open partner is liable for partnership debts until notice of a dissolution of the partnership is given; because his name is presumed to have lent credit to the concern. But it is different with a secret partner. He is liable for partnership debts only while the partnership *actually continues*, because he participates in the profits. But he is not liable after an actual dissolution, although no notice of that fact is given, because no credit was ever given to his name and the reason of his liability has ceased.

New trial ordered.

ELLERY v. CUNNINGHAM AND OTHERS.

Action on a conditional promise of the defendants to account for the proceeds of two bales of cotton, found by the plaintiff in Mobile.

ASSUMPSIT for two bales of cotton. In 1833, while the brig Martha was lying at Mobile, the plaintiff, who was mate of the brig, with his brother, picked up two bales of cotton, which they took on board, and which were brought to Boston. The bales were taken by the defendants with the other cargo, they promising to send out to Mobile and endeavor to ascertain the owners, and if none appeared, they were to account to the plaintiff and his brother. Subsequently the plaintiff purchased the right of his brother, and after making a demand for the proceeds of the cotton brought this action.

Paine for the plaintiff.

F. C. Loring for the defendant.

SHAW C. J., in delivering the opinion of the court, referred to the case of *Mc Laughlin v. Waite*, (5 Wend. 404), as containing a collection of cases respecting the rights of finders of property. But it was not necessary to consider that case in making a decision of this. This was the case of a clear and distinct promise by the defendants to account for the cotton if no owner appeared. It was said at the arugment that there was no consideration for the promise; but the court thought otherwise. It was also said, that the plaintiff was never in possession of the property; that it was always in the possession of the defendants, who had a lien upon it. But the court were of opinion that the plaintiff had a right of possession the moment he paid freight.

In regard to interest, the court thought that there was nothing in the case to take it out of the general rule, that factors were not liable for interest. The plaintiff would accordingly have judgment for $112, the gross amount of sales, subject to the usual deduction for commissions, &c.

Judgment for the plaintiff.

DAVIS AND OTHERS v. JENNEY.

Where there is a material alteration of a bill of exchange, whether the presumption is that it was made after the bill was completed, *quære*.

An expression of his opinion in relation to the effect of the evidence, by the judge presiding at a trial in his charge to the jury, is not the subject of exception.

ASSUMPSIT upon a draft, by the indorsees against the payer and endorser. At the trial before

MORTON J.,—the only ground of defence set up, was, that the draft was altered after the indorsement, by extending the time from *six* to *sixty* days. The only evidence in the case was the draft itself, upon which the defendant's counsel contended that the alteration was apparent. The jury returned a verdict for the plaintiffs, and the defendant excepted to the instructions of the judge, and also moved to have the verdict set aside as being against the weight of evidence.

English for the plaintiffs.

L. Williams for the defendant.

SHAW C. J.—At the trial of this cause, the jury were instructed that a material alteration of the bill after it was drawn, would render it invalid as against the indorser; that the extension of the time of payment from six to sixty days was a material alteration; that the burthen of proof was upon the defendant to show the alteration; that this must be determined by the jury upon the inspection of the paper itself; but if they were satisfied that there had been an alteration in the bill, the presumption would be in the absence of all explanation, that it was done after the completion of it by the signatures of the maker and indorser.

These instructions were substantially correct. We should indeed hesitate some time, before laying down the doctrine, in the full extent stated in the charge to the jury, that the presumption would be in the absence of all explanation, that an alteration of a bill was made after it was completed. But this direction was highly beneficial to the defendant, and we are not called upon to decide the point, as he does not complain of it, and the plaintiffs are satisfied with the verdict.

In summing up the case to the jury, the judge also remarked, that they ought to examine the writing with great care, to ascertain whether the difference, if any existed, in the appearance of the letters, was such as to show an alteration after the writing was complete, or might arise from replenishing the ink in the pen, which might happen to get exhausted in the middle of a word. He also drew their attention to the fact that the draft in question was an accommodation bill, and the probability or improbability that such a draft would be made for the term of six days.

The defendant's counsel also excepted to these instructions, but we think without just grounds. It is sometimes impossible for a judge, in charging the jury, to conceal entirely his own impression, as to the bearing of particular portions of the testimony ; and any expression of his as to the effect of the evidence, so that the jury may learn his opinion, is not the subject of exception. All that can be excepted to by either party, is any positive instructions upon a point of law.

Judgment on the verdict.

BISHOP v. SHEPHERD.

Where a minor shipped on board a whaling vessel, without the consent of his father, and afterwards deserted, by which his wages were forfeited, according to the shipping papers ; it was held, that his father might recover his wages of the owners, upon an implied contract. Held, also, that the captain was not liable to the father. Whether the captain of a whaling ship is ever liable for seamen's wages, *quære.*

THIS was an action in which the plaintiff sought to recover for the services of his minor son, who shipped on board a whaling ship of which the defendant was master, without the consent of the plaintiff. The son, before signing the shipping papers, exhibited to the defendant a forged instrument purporting to be signed by his father, giving him liberty to go the voyage. He deserted at a foreign port and the defendant came home without him. The principal question in the case was, whether the action would lie against the master.

Hallett for the plaintiff.

Coffin for the defendant.

SHAW C. J.—The shipping papers are not binding on the plaintiff, his son having signed them without his consent ; consequently the fact of the son's desertion is no defence to the present action. The plaintiff does not rely upon the contract made by the son as evidenced by the shipping papers, but upon an implied contract between himself and those who have had the benefit of his son's labor. In a case re-

cently decided in Essex, the court had occasion to consider the general question of forfeiture in a somewhat similar case, and it was there held, that a minor who shipped on board a whaling ship, was not bound by the shipping papers, which he had signed under the disability of non-age. The plaintiff, then, is entitled to the wages of his son; but he court are all of opinion that his remedy is against the owners, and iot against the master. The analogy between the case of the master of a whaling ship and that of the master of a merchant vessel fails, because in the latter case, the master is placed on a different footing, freight being the mother of wages, and he having a right to collect it. Accordingly seamen in ordinary mercantile voyages have a remedy against the master as well as against the ship and the owners. But in whaling voyages, the master is in a measure on the same footing with the seamen in regard to wages, the whole property in the oil remaining in the owners, until a division is made; and the plaintiff, having set up an implied contract, must look to those who have received the benefit of his son's earnings. Whether the master of a whaling ship would be liable for seamen's wages, upon the express contract between them, it is not necessary to decide, because the plaintiff does not rely on an express contract.

Judgment for the plaintiff.

COMMONWEALTH INSURANCE CO. v. WHITNEY.

What is a "promissory note" within the meaning of ch. 120, sec. 4, of the Revised Statutes.

In an action on a premium note on a policy of insurance, it is a perfect defence that the vessel was unseaworthy and the policy never attached.

ASSUMPSIT on a promissory note for one hundred dollars, dated September 24, 1824, payable to the plaintiffs in fourteen months and signed by the defendant. Upon the margin of the note there was the following memorandum. "Boston, Nov. 4th, 1831. For value received, I hereby acknowledge this note to be due, and promise to pay the same, on demand. *Salmon Whitney.* Attest, *J. Stevens, Jr.*"

At the trial in the court of common pleas, the defendant maintained that the note was barred by the statute of limitations. But the court ruled, that the writing upon the margin of the note was of itself a promissory note, and within the meaning of the exception to the statute contained in chapter 120, sec. 4, of the Revised Statutes, whereby promissory notes, signed in the presence of an attesting witness, are exempt from the operation of said statute.

The defendant then offered to prove that there was no consideration for the memorandum other than the note of Sept. 24, 1824; and that the latter was given for a premium on a policy of insurance, underwritten by the plaintiffs, on the schooner New Orleans; and that said schooner was unseaworthy during the whole period she was insured by the plaintiffs, and that the policy did not attach, and, therefore, the note was without consideration. And, further, that the plaintiffs re-

fused to pay a loss which accrued by the perils insured against, because said schooner was unseaworthy. But the court instructed the jury that it was not competent for the defendant to give these facts in evidence. The jury returned a verdict for the plaintiff and the case came up on exceptions to the ruling of the judge, and was argued by

Cruft for the plaintiffs, and by

Washburn for the defendant.

SHAW C. J., in delivering the opinion of the court, said, a case very similar to this, in one respect, came before the court recently in Essex. In that case, however, there was a simple acknowledgment on the back of the note that it was due, which was attested ; and the court held that this was not such an attested note as came within the exception of the statute of limitations. It was simply an acknowledgment of the debt, which might possibly be recovered as such by the proper averments. But in the present case, the tenor of the writing was very different, and the court were of opinion, that the charge of the judge in this respect was right.

In regard to the other point, the court were of opinion, that the charge of the judge was wrong, and that the evidence ought to have been admitted. The evidence offered by the defendant, would go to show that there was an entire failure of consideration, and this in an action between the original parties was proper evidence for the jury.

New trial ordered.

WILLIAMS v. WADE.

In an action against the indorser of a promissory note of hand, made in Illinois, the plaintiff must prove that judgment has been recovered against the original promissor and remains unsatisfied.

ASSUMPSIT on a promissory note of hand, payable to the defendant or order, and by him endorsed. The note was made in Illinois, and the defence was, that by the law of that state, an indorser is only liable after judgment has been recovered against the promissor, and remains unsatisfied.

Cooke for the plaintiff.

Choate for the defendant.

SHAW C. J.—We think the law of Illinois is to govern in this case. This provision, respecting the liability of indorsers goes not to the remedy merely, but to the substance of the contract and is a part of it ; and it makes no difference that the note in the present case is payable generally to order. There being no evidence that the plaintiff has complied with the law of Illinois, the default which was entered, must be set aside, and the cause stand for trial.

Court of Common Pleas, Massachusetts, April Term, 1840, *at Boston.*

PERRY AND ANOTHER v. EASTERN RAIL ROAD CO.

Depositions, taken before a justice of the peace in a neighboring state, are admissible evidence, unless the adverse party can show some special reason for rejecting them.

IN this case, the plaintiff offered certain depositions, which were taken before a justice of the peace in Maine.

Crowninshield, for the defendants, admitted, that the person before whom the depositions were taken, was a magistrate, and that notice was given to the adverse party as was stated in the caption, but he contended that they were not admissible, because they were not regularly taken under a commission; that the Revised Statutes had pointed out the manner of taking depositions out of the state, and although it was discretionary with the court to admit depositions taken in any other manner than the one prescribed, yet they ought not to be admitted unless the party producing them, showed some good reason for not pursuing the course pointed out by the Revised Statutes.

T. P. Chandler for the plaintiff.

WARREN J. said, the Revised Statutes provide the manner of taking depositions out of the state, but leave it discretionary with the court to admit those taken in any other manner, if taken before any notary public, or other person authorized by the laws of any other state to take depositions, provided that the adverse party had sufficient notice, or from the circumstances of the case, it was impossible to give such notice. In this case, it is admitted, that the adverse party had notice, and that the deposition was taken before a justice of the peace. It is, then, a proper case for the exercise of the discretion of the court. It is not necessary in a case like the present, for the party producing the deposition to show, that, from the peculiar circumstances of the case, he was unable to have it taken in the particular manner pointed out by the Revised Statutes. It is sufficient if he bring the case within the limits of the discretion of the court, when the deposition will be admitted, unless the *adverse party* can show some special reasons for rejecting it. None such appear here, and the deposition must go to the jury.

ROGERS v. MUNROE.

Practice:—Indorsement of writs.

IN this case a question arose under the provision in the Revised Statutes, chapter 90, sec. 10, which requires all original writs, &c., in which the plaintiff is not an inhabitant of the state, to be indorsed, before the entry thereof, by some sufficient person, who is an inhabitant of the state. The plaintiff in this case was described in the declaration, as of Augusta in the state of Maine, and the writ was indorsed in the following manner, viz: "*Gleason, Att'y.*"

Homer for the defendant, moved to dismiss the action for want of an indorser, and contended, that the indorsement was not sufficient to bind the attorney, and was merely the usual indorsement upon writs for the information of the clerk, and offered to show that all the writs of the plaintiff's attorney were indorsed in a similar manner.

Gleason for the plaintiff.

WARREN J. was of opinion, that the indorsement was sufficient, and the motion was dismissed.

RECENT ENGLISH DECISIONS.

High Court of Admiralty, January, 1840.

THE SCHOONER ALINE.

Collision:—Where only one of the vessels is in fault. Consequential loss.

THE *Panther*, a British brig of 132 tons, with a cargo of oil, from Gallipoli to St Petersburgh, going up the channel, and the *Aline*, a Russian schooner of 96 tons, with a cargo of flax, from Revel to Oporto, going down the channel, on the night of the 22d September last, came in collision about 25 miles south of Beachy Head, and six leagues from the coast. On the part of the *Panther*, it was alleged and sworn, that the wind at the time was south-south-east, the night clear and star-light; that the vessel was on the starboard tack, close-hauled; that, about half-past twelve, the mate, seeing the *Aline* coming down rapidly upon the *Panther*, when half a mile off, took a lighted lanthern from the binnacle and hailed her, but received no answer, and the vessels struck; and it was contended that, as the *Aline*, whose course was east by north, or half north, was on the larboard tack and had the wind free, it was her duty to give way. The *Panther* did alter her helm to avoid greater damage. On the part of the *Aline*, it was sworn that the wind was south-south-west and adverse, her course being north by west; that the night was dark, and the weather thick and rainy; that the vessel was close-hauled; that as good a look out was kept as the circumstances of the case admitted; and it was contended that the rule of navigation, that the vessel on the starboard tack should hold her course, was not an inflexible rule, applying less in the open sea than in the river Thames, and that if the *Panther* saw the *Aline* half a mile off, she might have avoided the collision. After the accident the *Aline* was refitted at Cowes, and the *Panther* proceeded to Newhaven for repair, and it was maintained, on the part of this vessel, that her owners were entitled to recover, not merely the expense occasioned by the actual injury she had sustained, but the consequential loss caused by her detention at Newhaven beyond the Baltic season. The court was assisted by two Trinity masters.

The *Queen's Advocate* and *Jenner*, D., for the *Panther*; *Haggard*, D., and *Robinson*, D., for the *Aline*.

Dr Lushington (addressing the Trinity masters.) There has been a great deal of discussion in this case as to the state of the wind, and no doubt the evidence is conflicting; on the part of the *Panther*, it is said to have been to the east of south, and on the part of the other vessel, south-south-west. Assuming the question to be of importance, it may not be difficult for persons acquainted with the principles and practice of navigation to draw the conclusion from the evidence; and it is probable that you may draw a correct conclusion from facts which, to a mind not nautical, may not appear to afford an opportunity of drawing any conclusion whatever. The question I have to ask you is whether you are of opinion that the collision took place in consequence of an error in the conduct of either vessel; if so I shall have no occasion to trouble you farther.

Capt. Stanley Clarke.—Having read the evidence, we have come to the conclusion, that the *Aline* did wrong in having her helm down; being on the larboard tack, she ought to have had her helm up.

Dr Lushington.—The Trinity masters being of opinion that the damage sustained by the *Panther* was owing to an error in the conduct of the master and crew of the *Aline*, the owners of the former are entitled to recover the expense of the damage.

A further question has arisen as to the consequential damage, and the court has been referred to the case of the *Betsey*, (2 Hagg. 28,) and that of the *Yorkshireman*, mentioned in a note on that case. I am of opinion that all I can do at the present is, to refer the question of damage generally to the registrar and merchants for their report; it would be premature and improper for the court to determine whether or not the voyage to St. Petersburgh and back was prevented by the accident. The court would require it to be satisfactorily proved, before it pronounced for consequential damage, that every possible exertion was made by the owners of the *Panther* to arrive at St. Petersburgh, get in a cargo and come back again. It is quite clear that the court has at present no evidence before it on which to form an opinion; though I should hold myself bound by the authority of Lord Stowell. I, therefore, refer the question of damage to the registrar and merchants generally, and if there is any dispute, it must be argued with reference to this question.

The Registrar.—The court directs the registrar and merchants to take the consequential damage into consideration?

Dr. Lushington.—I think it right to do so. Approving of the principle of Lord Stowell, I am still reluctant to saddle the owners of the *Aline* with all the homeward loss. As far as the principle of Lord Stowell goes, I am bound to follow it; but not further.

DIGEST OF AMERICAN CASES.

Selections from xv. Maine (iii Shepley's) Reports.

ACTION.

Actions may be brought before a Justice of the Peace in the county where the defendant lives, although the cause of action accrue from an injury to real estate within a different county.—*Morton v. Chase*, 188.

ACTION OF ASSUMPSIT.

1. Where the parties contract under a mutual mistake of the *facts* supposed to exist, there being no fraud, and no beneficial interest obtained, the one who pays can recover back the money paid.—*Norton v. Marden*, 45.

2. But money paid under a mistake of the *law* cannot be reclaimed.

A mistake of a *foreign law* is regarded as a mistake of a fact.—*Ib.*

3. Nor can it be recovered back, when voluntarily paid, or paid with a knowledge, or means of knowledge in hand, of the facts.—*Ib.*

4. Nor where there may have been a mistake of the facts, if the party paying has derived a substantial benefit from such payment.—*Ib.*

AGENT AND FACTOR.

1. When payment is not made at the time, a sale by a factor creates a contract between his principal and the purchaser; and after notice of the claim of the principal, the purchaser is bound to pay him.—*Edmond v. Caldwell*, 340.

2. And if the factor take a note of the purchaser for the amount of the sale, payable to himself only and not to order, and hand it over to the principal, yet the action may be maintained by the principal for the goods sold in his own name.—*Ib.*

ATTACHMENT.

If an officer return an attachment of land as *supposed* to belong to the debtor, such qualifying term does not impair the effect of the attachment, where the land in fact is the property of the debtor.—*Banister v. Higginson*, 73.

BAILMENT.

If one man let to another personal chattels for an indefinite time, and the latter, for the purpose of using them to greater advantage, put with them chattels of his own, and while thus in his possession, the whole are attached, taken away and sold as his property by an officer; the owner of the chattels thus let, may maintain trespass for them against the officer.—*Sibley v. Brown*, 185.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A presentment of a draft, payable at a particular bank, to the cashier for payment at the bank, on the day it fell due, but after business hours, who refused payment because the acceptors had provided no funds, was held sufficient.—*Flint v. Rogers*, 67.

2. After due demand and refusal of payment, and after notice thereof has been put into the post-office directed to the indorser of a draft resident in another town, an action against such indorser, commenced on the same day, may be maintained, although by the regular course of the mail the notice would not reach him until the next day.—*Ib.*

3. The declarations of the payee of a note, who is not at the time the holder, and while it is actually held by another for value, are not admissible in evidence in a suit upon it against the maker by an indorsee.—*Russell v. Doyle*, 112.

4. The acceptance of a bill of exchange by the drawee, is presumptive evidence that he had effects of the

drawer in his hands.—*Kendall v. Galvin*, 131.

5. A paper directed to certain persons, requesting them to pay a specified sum to a person named, and charge the same to account of the drawer, and dated and signed, is a bill of exchange; although it is neither made payable to order or bearer, nor has the words value received, nor is made payable at a day certain, nor at any particular place.—*Ib.*

6. A bill of exchange drawn by a person residing in one state of the Union upon a person residing in another, and payable there, is a foreign bill.—*Green v. Jackson*, 136.

7. In an action upon a foreign bill, the protest is competent evidence to prove presentment of the bill to the acceptor and non-payment.—*Ib.*

8. If a person who indorses a bill to another, for value or collection, shall again come to the possession thereof, he shall be regarded, unless the contrary appear in evidence, as the *bona fide* holder of the bill, and entitled to recover, although there may be upon it his own, or a subsequent indorsement which he may strike from the bill or not at his pleasure.—*Ib.*

9. Although the holder of a bill is entitled to an action against the drawer or indorser immediately after due diligence has been used to give them notice; yet no suit against them, commenced before enough has been done to render them absolutely liable, can be maintained.—*Green v. Darling*, 139.

10. Where the residence of the holder of a bill and of the party to be notified is in the same town, it is not sufficient to put a notice into the post-office; personal notice must be given, or the notice must be left at his residence or place of business.—*Green v. Darling*, 141.

11. Where the parties reside in the same town, notice of the dishonor of a bill on the nineteenth day after receiving information thereof is too late.—*Ib.*

12. The sale of a negotiable note, free from usury when made, and available as a good note before the sale, at a greater discount, than legal interest, is not usurious, although indorsed by the party making the sale; and on non-payment by the maker, the *indorsee* may maintain an action against the *indorser*.—*French v. Grindle*, 163.

13. The sum which the indorsee is entitled to recover from the *indorser* is the amount of the money paid for the note with interest.—*Ib.*

14. Where a note is made payable at either of the banks in a city or town, it is not the duty of the holder to give notice to the maker at which of the banks the note will be presented for payment, when it falls due.—*Page v. Webster*, 249.

15. Mere delay to enforce the collection of a note against the maker, does not discharge an indorser, once made liable, where the holder does not so bind himself to give time to the maker, that an action against him on the note cannot be maintained.—*Ib.*

16. Nor is such liability discharged by the neglect of the holder to commence a suit against the maker, when so requested by the indorser.—*Ib.*

17. Nor is the indorser discharged by the neglect of the holder to enter an action against the maker, thereby releasing property attached on the writ, which was afterwards conveyed.—*Ib.*

18. In an action against the indorser of a note, when the facts have been ascertained, whether legal notice has or has not been given, and whether due diligence has or has not been used, are questions of law to be decided by the court.—*Thorn v. Rice*, 263.

19. Where the evidence to prove notice to an indorser is too loose, deficient and uncertain, to authorize a jury to find in the affirmative, a judge

of the common pleas may rightly decide, that the action is not maintained, without submitting the case to a jury. —*Ib.*

20. Where the usage of a bank, in relation to giving notice to an indorser, is so loose and variable, and so different from what the law requires, as to leave it uncertain, whether any notice was given to the indorser, *at any time or place*, or put into the post-office for him, such indorser is not bound by such usage by doing business with the bank.—*Ib.*

21. When a bill is drawn, accepted and indorsed, possession is *prima facie* evidence of ownership.—*Lord v. Appleton*, 270.

22. A notice left in the office and usual place of business of the indorser of a bill, with a person in charge of the office, is sufficient.—*Ib.*

23. When a notice to an indorser is regularly deposited in the post-office, the risk of delay rests upon the party to be notified.—*Ib.*

24. The payee of a negotiable note, indorsed before it fell due, cannot be received as a competent witness to prove the note originally void.—*Clapp v. Hanson*, 345.

25. It is not competent for the maker of a negotiable note to set up in defence usury in the transfer from the payee to the indorsee.—*Ib.*

26. The alteration by the holder of the date of an accepted bill, shortening the time of payment, without the knowledge of the acceptor, destroys the bill; and no action can be maintained upon it.—*Hervey v. Harvey*, 357.

27. The holder of a bill has no right to make an alteration in it to correct a mistake, unless to make the instrument conform to what *all parties to it* agreed or intended it should have been.—*Ib.*

28. Where a negotiable note has been assigned, but not indorsed, proof by the maker, that there was not consideration, or that the note was fraudulently obtained by the payee, is admissible.—*Calder v. Billington*, 398.

29. A guaranty of payment upon a negotiable note over the signature of the indorser, is *prima facie* evidence that it was written at the time the indorsement was made.— *Gilman v. Lewis*, 452.

30. There is no necessity of causing inland negotiable notes to be protested.—*Ib.*

31. A guaranty of payment of a negotiable note, "for debt and costs without demand or notice," made by the indorser, renders him liable to the indorsee for the costs of a fruitless suit against the maker, but does not subject him to the payment of the expense of a protest.—*Ib.*

BONDS.

1. Where the condition of a bond provides, that the obligors shall sell and convey a tract of land to the obligees by good and sufficient deeds of warranty within four months from a day fixed, provided the obligees pay or cause to be paid their indorsed notes and drafts, dated on the same day, and payable to their own order in four months from date, according to their tenor; and provided also, that within said term of four months, they pay or secure to be paid, a further sum in four equal annual payments; payment, or unconditional tender of payment, of the notes and drafts, is a condition precedent to the right of the obligees to maintain an action on the bond.—*Winslow v. Copeland*, 276.

2. In an action on a bond, conditioned to purchase and pay a stipulated price for a tract of timber land, testimony that the land was of trifling value compared with the price contracted to be paid therefor, is inadmissible in evidence, unless the party will also prove, that the obligee made fraudulent representations in relation to the same, or had knowledge of the facts when the contract was made.—*Robinson v. Heard*, 296.

3. In such suit, if the terms of the contract show that payment of money is to be made *before the deed is to be given*, and no money is paid or offered at the time fixed, the action may be maintained without first tendering a deed of the land.—*Ib.*

CONSPIRACY.

A conspiracy to commit a misdemeanor is not merged in the commission of it.—*State v. Murray*, 100.

CONTRACT.

1. Where a right to cut and take a certain quantity of standing timber from a tract of land is reserved, or given, in a written contract, and no *time when* is fixed by the parties, the law prescribes *a reasonable time* within which it must be done.—*Sawyer v. Hammatt*, 40.

2. When written instruments have reference to a former contract, and contain recitals of its subject matter, and it appears that there is a variance between such instruments, and between them and the contract; the recitals are to be explained and corrected by the contract to which reference is made. —*Ib.*

3. If a contract in writing expressly refer to a written instrument, the law will imply, that a party to the contract has notice of the contents of such instrument.—*Ib.*

4. The contract of a guardian to sell the real estate of his minor ward, although in writing, made when he has no authority to make the sale, is illegal and void.—*Worth v. Curtis*, 228.

4. An agreement by a married women for the sale of her real estate, although made with the assent of her husband, and for a valuable consideration, is void in law, and will not be enforced in equity.—*Lane v. McKean*, 304.

5. Where a contract was made in a foreign province, to be performed within this state, and damages for the non-performance are sought by a suit here, the laws of this state are to govern, in the absence of all proof of the foreign laws.—*White v. Perley*, 470.

CONVEYANCE.

By the conveyance of a sawmill and the privileges and appurtenances thereunto belonging, the land whereon the mill stands, as well as so much as is necessary to the use of it, passes with the mill.—*Maddox v. Goddard*. 218.

CORPORATION.

A corporation is not bound by the declarations or acts of individual members thereof, made or done at a time when they were not acting as the agents of such corporation.—*Ruby v. Abyssinnian Society*, 306.

DEPOSITIONS.

1. Where the justice, taking a deposition omits to certify, that the adverse party was duly notified, but annexes the notification, from which it appears that legal notice was given, the deposition is admissible.—*Homer v. Brainerd*, 54.

2. Where depositions are taken out of the state by persons duly authorized, they may be admitted in civil actions, or rejected, at the discretion of the court, although the mode of taking may vary from our forms.—*Blake v. Blossom*, 394

DOWER.

1. Where the land at the time of the alienation by the husband, was pasture and woodland, the widow is entitled to dower therein.—*Mosher v. Mosher*, 371.

2. The widow, on the assignment of her dower, is to be excluded from the increased value arising from labor and money expended upon the land after the alienation, but not from that which has arisen from other causes.—*Ib.*

EQUITY.

1. This court has equity jurisdiction, where the bill charges a fraudulent conveyance of land, made to defeat and delay creditors.—*Traip v. Gould*, 82.

2. In bills in equity, seeking relief, if any part of the relief sought be of an equitable nature, the court will retain the bill for complete relief.—*Ib.*

3. In equity as well as in law, the rule is well established, that parol evidence is not to be received to contradict, add to, or alter, a written contract. —*Eveleth v. Wilson*, 109.

4. But parol evidence tending to prove matters intrinsic to the terms of a written contract, for the purpose of applying it to the subject to which it relates, does not come within this rule. —*Ib.*

5. An ambiguity arising from too great generality of description may be removed by parol evidence, which applies it to a single point.—*Ib.*

6. As the right of dower is a clear legal right, it cannot be regarded in equity as fraudulent to claim it at law, unless there has been some forfeiture, release, bar or satisfaction, which cannot be proved at law, but which may be established in equity.—*O'Brien v. Elliot*, 125.

7. To be a satisfaction of dower in equity, the equivalent must be designed and accepted in lieu of, or as an equivalent for dower.—*Ib.*

8. Where a creditor levied his execution on land of his debtor, and after the right to redeem had expired, sold the land with warranty for a sum exceeding the amount of his debt, and paid the balance to the widow and children of the debtor after his decease; these facts do not furnish a bar in equity to the claim of the widow to dower in the premises.—*Ib.*

9. When one party makes a misrepresentation of fact, upon the faith of which the other acts, it is immaterial, in a court of equity, whether he knew of its falsehood, or made the assertion without knowing whether it were true or false; and a conveyance of land obtained by such false representation is void.—*Harding v. Randall*, 332.

EVIDENCE.

1. In an action against a town for damages sustained in the loss of a horse, alledged to have been caused by a defect in the highway, and where the defence was, that the injury was occasioned by driving rapidly an unbroken and unmanageable horse in the night, and not by the badness of the road; *it was held*, that evidence of the previous bad behaviour of the horse was admissible.—*Dennett v. Wellington*, 27.

2. On the trial of an indictment against several for a conspiracy to charge a married woman with the crime of adultery, the wife of one of the persons indicted cannot be a witness.—*State v. Burlingham*, 104.

3. The declarations of the payee of a note, who is not at the time the holder, and while it is actually held by another for value, are not admissible in evidence in a suit upon it against the maker by an indorsee.—*Russell v. Doyle*, 112.

4. The unwritten or common law of a foreign country or province must be proved as a fact.—*Owen v. Boyle*, 147.

5. The court cannot presume without evidence, that the common law of England is also the common law of her colonies.—*Ib.*

6. Where goods have been delivered on an order, proof of the admission of the debt by the purchaser dispenses with the production of the order.—*Phillips v. Purrington*, 425.

FRAUDS, STATUTE OF.

1. A contract in relation to real estate, to be binding at law, must be in writing, and signed by the party to be charged, or by some other person by him thereunto lawfully authorized; but where the writing is not under seal,

it is not necessary, that the authority of one to sign for another should be in writing.—*Blood v. Hardy*, 61.

2. A condition in such writing for the benefit of the party to be charged may be waived by him by parol.—*Ib.*

3. Where a contract for the sale of land, which when made was within the statute of frauds and might have been avoided thereby, has been fully executed, and nothing remains but to pay over the money received, the statute furnishes no defence.—*Linscott v. McIntire.*

INDICTMENT.

1. An informality in the process of commitment of a prisoner is no justification for breaking the prison to effect an escape.—*State v. Murray*, 100.

2. In an indictment on the statute prohibiting the sale of lottery tickets, giving the accused the addition of *lottery vender*, when his proper addition was *broker*, furnishes good cause for abating the indictment.—*State v. Bishop*, 122.

3. It is a general rule in criminal prosecutions, that an unnecessary averment may be rejected where enough remains to show, that an offence has been committed.—*State v. Noble*, 476.

4. There is one exception, however, to this rule, which is where the allegation contains matter of description. Then if the proof given be different from the statement, the descriptive words cannot be rejected as surplusage, and the variance is fatal.—*Ib.*

INFANCY.

Infancy is no bar to an action of trover, where the goods converted by the minor came into his hands under a prior illegal contract.—*Lewis v. Littlefield*, 283.

LIMITATIONS.

1. Declarations or acknowledgments from which a new promise might be inferred, if made by the debtor himself, will not be sufficient for that purpose when made by the executor or administrator. If the executor or administrator can charge the estate by any promise made by him to pay a demand barred by the statute of limitations, it must be an express promise or agreement to pay, and not a mere acknowledgement of the existence of the debt.—*Oakes v. Mitchell*, 360.

2. The words, "an arrangement will soon be made to pay the note. I calculate to pay it, and I always calculated to pay it," addressed by the administrator of an estate to the holder of a note barred by the statute of limitations, are not sufficient to charge the estate.—*Ib.*

3. A new promise, made by one of two joint promissors, will take the case out of the statute of limitations against both.—*Pike v. Warren*, 390.

Where the maker of a witnessed promissory note, payable in 1811, to the treasurer of a corporation or his successor in office, afterwards in 1828, added to the bottom of the note the words, "*I hereby renew the above promise*," and subscribed his name thereto, and it was attested by a subscribing witness; in an action brought in 1836, upon the note and new promise, in the name of the corporation, *it was held:*

4. 1. That the action was rightly brought in the name of the corporation.—*Warren Academy v. Starrett*, 443.

5. 2. That the proof of the *new promise* by the subscribing witness thereto, was sufficient to authorize reading the note to the jury.—*Ib.*

6. 3. That the action was not barred by the statute of limitations.—*Ib.*

7. 4. That the note was a sufficient consideration to support the new promise.—*Ib.*

8. 5. That parol evidence that the note was made to show an apparent amount of funds, to enable the corporation to obtain a grant from the state, and that it was agreed at the time, that it should be given up after the payment of interest for a few years, was inadmissible—*Ib.*

9. 6. And that parol evidence that the new promise was made on a condition which had not been complied with, was inadmissible.—*Ib.*

MORTGAGE.

1. The mortgagee of personal property, where there is no agreement that the mortgagor shall retain the possession, may maintain replevin therefor, before the expiration of the time of credit; although the mortgagor had been suffered to retain the possession, and had sold the property to a third person.—*Pichard v. Low*, 48.

2. If a mortgagee enter into actual possession before breach of condition, he will be holden to strict accountability; and cannot recover against the mortgagor in an action of assumpsit, brought after the discharge of the mortgage, for repairs not necessary for the preservation of the estate.—*Ruby v. Abyssinian Society*, 306.

OFFICER.

1. Where an officer has made a false return, he is responsible for the ordinary results of his own acts; but not for the illegal or oppressive conduct of the creditor, or another officer. The injury and loss which the plaintiff actually sustained by the false return are the only proper subjects of examination in estimating the damages.—*Norton v. Valentine*, 36.

LEGISLATION IN MASSACHUSETTS.

At the late session of the legislature of this commonwealth, which closed on Tuesday, March 24, after a session of about three months, a large number of acts and resolves were passed, most of which are of a private character.—Unusual interest was felt at the time this body assembled, from the fact that the two political parties were more nearly balanced than they had been for many years. Robert C. Winthrop, the whig candidate, was elected speaker of the house by a small majority. Daniel P. King was elected president of the senate. After the legislature had been in session several weeks, Marcus Morton was declared to be elected governor by the people, he having a majority of two votes, there being upwards of one hundred thousand votes thrown.

Both political parties were ably represented, particularly in the house of representatives, and there were many interesting debates upon questions of national interest. An amendment of the constitution was submitted to the people, and has since been adopted by them, which will tend, in some measure, to diminish the number of representatives. The act of 1838 called the "fifteen gallon law," was repealed by a large majority. Attempts were made to abolish the board of education and the board of bank commissioners, but without success.

MARRIAGE.

A large number of petitions were presented for the repeal of the provision in the Revised Statutes prohibiting marriage between white persons and negroes, mulattos and indians. A motion to repeal the law passed by a majority of one. The reasons of many who voted in the affirmative, are probably contained in the remarks of Mr Parsons, of Boston, who said he had finally concluded to vote for the repeal of the law, as he wished to save future legislatures from hearing such speeches as had just now exhausted the patience of the house. It was a law of no practical importance; and its only actual effect seemed to be, to supply one more topic for turbulent and inflammatory discussion. Every

year our table is heaped with petitions, and every year scenes like the present are repeated here; and every year it costs the commonwealth thousands of dollars, which are a great deal more than it is worth. He was exceedingly unwilling to vote to repeal this law, and should do so with very great reluctance. The whole subject filled him with disgust; but he deemed it his duty so to vote that the whole subject may be swept away, where neither we nor our successors may hear more of it.

DIVORCE.

Whenever on hearing of any application for divorce, the fact of marriage is required or offered to be proved, evidence of admission of said fact by the party against whom the process is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence, from which said fact may be inferred, shall be received as competent evidence for consideration.

COURTS.

Hereafter there is to be no appeal from any judgment of the court of common pleas upon the verdict of a jury, but in all actions which shall be pending in that court, in which the damages demanded or the property claimed, shall exceed in amount or value the sum of six hundred dollars if in the county of Suffolk, or three hundred dollars if in any other county, the defendant if he or any person in his behalf, shall at the first term of the court, make oath or affirmation before the clerk or any justice of the peace, that he verily believes he has a substantial defence, and intends to bring the cause to trial, may have such action removed to the supreme judicial court. Any party aggrieved by any judgment of the court of common pleas, founded upon matter of law apparent on the record, except judgment upon pleas in abatement, may appeal therefrom to the supreme judicial court, at the next term thereof for the same county.

The number of justices of the supreme judicial court is hereafter to be four only.

PASSENGER CARRIERS.

If the life of any person, being a passenger, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, stage coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents in this commonwealth, such proprietor or proprietors, and common carriers, shall be liable to a fine not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs; one moiety thereof to go to the widow and the other to the children of the deceased; but if there shall be no children, the whole to the widow; and if no widow, to heirs, according to the law regulating the distribution of intestate personal estate among heirs.

MILITIA.

All persons over the age of eighteen and under the age of fortyfive years, with the usual exceptions, are hereafter to be enrolled as the militia, but are to be subject to no active duty whatever, except in case of war, invasion, or to prevent invasion. The active militia of the commonwealth is to be composed entirely of volunteers. The whole number is not to exceed ten thousand. They are to be armed at the expense of the state, and each man is to receive

five dollars annually. Every non-commissioned officer and soldier is to be holden to do duty five years from his enlistment, unless absolutely incapacitated or regularly discharged. There are to be three parades in each year and one inspection and review. These volunteers are to be first ordered into service in case of war or invasion, or to prevent invasion—to suppress riots or to aid civil officers in the execution of the laws of the commonwealth. The fines are, for non-appearance at the annual parades, four dollars and a forfeiture of the annual pay; for non-appearance in case of riot or other cause, fifty dollars; and the certificate of the commanding officer of the company, duly signed by a majority of the officers, is to be competent evidence of such non-appearance.

NOTES ON THE EARLY JURISPRUDENCE OF MAINE.

Although the settlement of Maine was cotemporary with that of Massachusetts, her early jurisprudence was far inferior to that of the latter, prior to the union of the two colonies.

The objects of colonization in the two territories were totally distinct: the foundations of their civil polity were laid upon entirely different principles.—The founders of the one were influenced by strong religious sentiment: those of the other were mere private adventurers, who sought by scattered and desultory efforts to promote their own private interest, without reference to the welfare of the state. The organization of the latter was imperfect: the people were held together in a civil community rather by the pressure of outward circumstances, than by any internal sanctions or attractions. As many of them were outcasts from foreign lands, "the cankers of a calm world," they hung loosely upon society, and their morals were as loose as their laws were indefinite and feebly executed. They were a rude people, every man pursuing his own path for his private advantage, regardless of the public institutions or the future hopes of the country.

The whole territory, for many years after its first occupation, was owned and governed by private individuals who resided in England. The title was subject to many conflicting claims, arising from want of certainty in the description of the various grants by which it was parcelled out, and by a total ignorance of the geography of the country, by the Plymouth company, and the other early proprietors who claimed the jurisdiction. The grant to Gorges and Mason, of 1622, extended from the Merrimac to the Kennebeck: the patentees duly entered upon their ample domain and divided it; Mason taking the portion lying in New Hampshire, and Gorges that situated in Maine. But within thirteen years from the date of this charter, the council of Plymouth made no less than *ten* grants within the territory previously assigned to Gorges: some of these were accompanied by powers for the exercise of government, which led to serious collisions and controversies that unhappily distracted and enfeebled the infant colonies.

East of the Kennebeck river, there was even less regard paid to the forms of law and the order of civil society, than on the west. The inhabitants were spread along the coast, principally employed in the fisheries and in trading with the natives, and seem to have been governed by no principle but that of

gain, and to have acknowledged no master but their passions. The English settlements, for the first century, extended no farther east than the Penobscot: the coast beyond was sprinkled here and there by French hamlets, a fort or a block house, which gave occasion to frequent feuds between the people of the rival nations which were then contending for supremacy upon this continent.

Such is a brief view of the condition of Maine, until the jurisdiction of Massachusetts was extended over it by the charter of 1691, and until her laws had acquired an ascendancy over the opinions and manners of the people. Beside this, the frequent interruption in their pursuits by Indian hostilities, and the thrice entire dispersion and overthrow of all their institutions and domestic establishments by the same cause, prevented the inhabitants from acquiring any permanent character or reaping the fruits of a peaceful government.

In the portion of this territory over which that most untiring and indefatigable adventurer, Sir Ferdinando Gorges, for a while exercised jurisdiction, an attempt was made to introduce some formal modes of action. He labored with unwearied effort to give a character and permanency to the institutions of government. In 1639 he obtained from the king, after long and incessant application, the power to establish a government in his province, and immediately commenced the exercise of authority under his new privileges. He thus describes the course he pursued:—"First, I divided the whole into eight bailiwicks or counties, and those again into sixteen several hundreds, consequently into tithings and parishes, as people did increase." Of the government he adds—"In my absence I assigned one for my lieutenant or deputy, to whom I adjoined a chancellor, for the determination of all differences arising between party and party, for *meum* and *tuum* only: next to him I ordained a treasurer, for receipt of the public revenue; to them I added a marshal, for the managing of the militia, who hath for his lieutenant a judge marshal and other officers to the marshal court, where is to be determined all criminal and capital matters, with other misdemeanors or contentions for matters of honor and the like." To these were added "an admiral with his lieutenant or judge, for the ordering and determining of maritime causes," a master of the ordnance, &c. "These are the standing councillors, to whom is added eight deputies, to be elected by the freeholders of the several counties, as councillors for the state of the country, who are authorised by virtue of their places, to sit in any of the aforesaid courts, and to be assistants to the president thereof."

An organization was partially accomplished under this ample outline; but the materials for filling it up were seriously deficient. The lord proprietor appointed Sir Thomas Josselin his first deputy in 1639, but he probably never came over; and the next year his nephew, Thomas Gorges, who is styled in the histories of that day, a gentleman of the inns of court, was placed at the head of the colonial government. Gorges could easily make divisions of territory upon paper, but he could not so easily furnish the people who were to occupy his bailiwicks and his hundreds. Great praise is nevertheless due to this worthy and indefatigable proprietor, who was in advance of his age on the subject of colonization: he spent a large fortune and wore out a valuable life in premature attempts to breathe vitality and civilization into this wilderness.

Previous to obtaining full powers of government, which he had earnestly sought for several years, Gorges took some measures to govern the inhabitants who had begun to occupy his province. He gave to his colony the name of New Somersetshire, from the county in which his estates in England were situated, in 1635, and the same year sent over a nephew, Capt. Wm. Gorges, as governor of his territory. This gentleman held a court at Saco, March 21,

1636, the members of which were called commissioners. This is the first court of which we have any record in Maine. At this court, four persons were fined 5 shillings each, for getting drunk: Mr George Cleeves was fined 5 shillings for "rash speeches," and "Mr John Bouighton for incontinency with Ann, his father's servant, is fined 40 shillings, and said Ann, 20 shillings, and he to keep the child" The jurisdiction of this tribunal extended from Piscataqua to the Kennebeck; but we are not able to find any record of its proceedings later than 1637. Previous to the establishment of this court, we have reason to believe that the people in different parts of the province, regulated their own affairs by means of combinations among themselves. The first record of any judicial proceedings in Maine, commences thus:—"At a meeting of the commissioners in the house of Capt. Richard Bouighton, in Saco, this 21st day of March, 1636, present Capt. Richard Bouighton, Capt. William Gorges, Capt. Thomas Causmock, Mr Henry Josselyn, Gent., Mr Thomas Purchas, Mr Edward Godfrey, Mr Thomas Lewis, Gent." Chalmers in his annals, speaking of Wm. Gorges, says, "he ruled for some years a few traders and fishers, with a good sense equal to the importance of the trust."

This government was suspended in 1639 by the more formal one which we have above noticed; the first court under which, was held in 1640 at Saco, and was styled the "General Court." Thomas Gorges, who was a lawyer, and the only one of that profession who appears in our annals during the first century of the colony, presided in this court as the deputy of the proprietor, and no doubt gave to its proceedings something more of formality than they had been accustomed to receive. He remained in the colony, however, but two or three years, sufficiently long, probably, to expel from his imagination all the *El Dorado* notions which many in Europe entertained at that day of this new found world.

This general court seems to have performed the multifarious duties of establishing ordinances for the public welfare, trying criminal offences and redressing private grievances; it exercised the three fold duties embraced in the legislative, executive, and judicial powers. At the first court held by Gorges, Sept. 8, 1640, there were pending 28 civil actions, of which 9 were jury trials: there were also 13 indictments, which were tried by the court without the intervention of a jury; Four of these were against George Burdett, minister of Agamenticus, now York, for adultery, breach of the peace and incontinency, and what appears singular, Burdett recovered judgment in two actions for slander against persons for reporting the very facts for which he was found guilty at the same court. They passed an order that the general court should be held at Saco every year on the 25th of June. They also divided the province into two parts, one extending from the Piscataqua to Kennebunk, the other from Kennebunk to Sagadahock, that is the Kennebeck, and in each division established an inferior court, to be held three times a year, to have cognizance of all cases except "pleas of land, felonies of death or treason."

After the departure of Thomas Gorges, all form and technicality disappear from the records. We propose to make some extracts from the proceedings of these ancient courts, as well to show the manners of the age as the mode of judicial business at that day.

"We present John Diamond and Jane Andrews for suspicion of incontinency. John Diamond is fined 40 shillings, and an act of separation is mayd, that John Diamond and Jane Andrews are not to keep company with one another."

"We present Goody Mendum for saying to Thomas Gullison and John Daniel, submit ye Devils. Fined 2*s.* 6*d.* for swearing."

"We present Jonathan Davis for affronting the court by giving unseemly speeches with his hat on. Discharged with an admonition, paying 5 shillings."

"Nicholas Shapleigh, Plant. in an action of the case for unjust molestation agst. Mr Robert Knight, defendant. The jury find for the Plant. 40 shillings damage, and costs of court. This verdict disaccepted by the court, the thing not being legal for the jury to bring in a verdict into this court which exceeded not the sum of 40 shillings."

"We present Christopher Feersone, for living from his wife. One twelve month's time given him by the court to procure his wife to come over or else he return to her again."

"We present Jane, the wife of John Andrews, for selling a firkin of butter unto Mr Nic. Davis that had two stones in it, which contains fourteen pounds, wanting two ounces in weight. This presentment owned by Jane Andrews and John Andrews, her husband, in five pound bond is bound thus, Jane, his wife, shall stand at a town meeting at York, and at a town meeting at Kittery, till two hours' time be expired, with her offence written in capital letters pinned upon her forehead." "This injunction fulfilled at a commiss'n court according to order, January 18, 1653."

"We present Jona. Thing for speaking discornfully of the court of York, saying, no question but you may cast any cause at the court of York, so long as Harry the coachman sits judge." "Jona. Thing censured to have 20 lashes, or to redeem it with 12 pounds."

In 1661 the court passed the following order: "It is ordered by the court that every juriman, either for the grand Inquest or jury of Tryals, shall have allowed him by the county 3 shillings per day for their service, he bearing all his own charges, while thereon, he continually being allowed for his time of comeing to court and returning back as followeth, viz. 5 days from Falmouth and back, 15 shillings," &c., mentioning the other towns in the province.

"We present Mrs Sarah Morgan for striking of her husband. The delinquent to stand with a gag in her mouth half an hour at Kittery, at a publick town meeting, and the cause of her offence writ and put upon her forehead, or pay 50 shillings to the treasurer."

1671. "Thomas Nuberry for his light and uncivil carriages about the wimen, is concluded to pay five pounds to the treasurer, or to receive ten lashes on his bare skin at the post. Nuberry stands to the fine."

1674. "We present Charles Potum for living an idle lazy life, following no settled employment. Major Bryant Pendleton joined with the selectmen of Cape Porpus to dispose of Potum according to law, or put him under family government."

"Thomas Cossons charged with suspicion of perjury. The court finds him not guilty; but being convicted of presumptuous and reproachful expressions against Capt. Joshua Scottow, which do not appear to be true, is sentenced to be admonished, and pay the costs, 10 shillings."

"Mr John Bray complayns of Goody Fra. Whitte for stealing of a silver spoon. The case being examined before the President, Fra. Whitte fined for lying about the premises."

These extracts are sufficient to give an idea of the nature of legal proceedings in Maine for the first hundred years after its settlement. From that period they began to emerge from their rude and inartificial form, and to assume something of a technical character. But it was not until some years after,

when gentlemen of the legal profession began to preside in the courts and to practise at the bar, that they acquired the precision and accuracy which preceded the present Augustan period of the law.

We shall take a future opportunity to follow the progress of these improvements, and to furnish some notices of those persons who have led the way in them for the last century. W.

Portland, Me.

CRITICAL NOTICES.

DIGEST OF THE DECISIONS OF THE COURTS OF COMMON LAW AND ADMIRALTY in the United States. By THERON METCALF and JONATHAN C. PERKINS. Vol. I. Boston: Hilliard, Gray & Co. 1840.

IT gives us much pleasure to announce, that the first volume of this long expected digest has at length appeared. It is a royal octavo of seven hundred pages, printed in double columns and fine type. This volume commences with "*abandonment*" and terminates with "*custom and usage.*" The matter is arranged alphabetically. It is, beyond all question, the best work of the kind ever published in this country, and will be a complete substitute for many of the American reports. It is by no means a work of scissors and paste, like many digests, the compilers of which have, apparently, never read the reports thoroughly, but have merely collected and arranged the abstracts prepared by the reporters. On the contrary, the authors appear to have trusted very little to the abstracts of the reporters, but have examined every case for themselves, and have stated in their own language, the doctrine as they understood it to be laid down by the court. Thus, for instance, in the case of *Hatch v. Dwight*, (17 Mass. R. 289), the marginal note is as follows:

"The owner of a mill privilege, on which a mill has formerly stood, but on which no mill is actually standing, is entitled to an action against one, who, by erecting a dam below, renders the site useless for the purpose of erecting a mill; unless the owner has abandoned it evidently with an intent to leave it unoccupied."

This is placed by the reporter under the title of "*mills.*" In Metcalf's Digest of Massachusetts Reports, it is found under the title of "*action on the case (nuisance).*" In the work before us, under "*Abandonment,*" we have the following statement of points decided in this case:

"A mill-site or privilege once occupied, may be abandoned by the owner; and if abandoned with an intent to leave it unoccupied, the rights of other owners on the stream are the same as if the site or privilege had never been occupied."

In many instances, points are stated which are not to be found in the marginal notes of the reporters. And it is evident, that not only have the cases been carefully studied, but also former digests. Thus in the case of *Banorgee v. Hovey*, (5 Mass. R. 11), the point decided is thus stated in Bigelow's Digest:

"If an agent be authorised to contract a debt by *parole*, for his principal, and the agent give his *bond* for the debt, the obligee cannot maintain *assumpsit* against the principal, to recover the debt."

This is a great improvement on the marginal note of the reporter, as will be evident by a moment's glance at the case. But the point is stated in the work before us in much better language:

"If an agent be authorised to contract a debt by parol, for his principal, and he give his own bond for the debt, the obligee cannot maintain assumpsit against the principal to recover the debt."

It is perfectly evident, that this work is something more than a mere collection of the abstracts of cases contained in the reports and in former digests.—It is, in an important sense, an original work, the preparation of which must have required immense labor and tasked severely the highest faculties of the mind. No lawyer's library will be complete without it, and we do not doubt, that the authors will feel encouraged by the favorable reception of this first volume, in their arduous labors upon the other two.

THE REVISED STATUTES OF THE STATE OF NORTH CAROLINA, passed by the General Assembly at the session of 1836–7. Revised under an act of the General Assembly, passed at the session of 1833–4. By FREDERICK NASH, JAMES IREDELL and WM. H. BATTLE. Raleigh: Published by Turner & Hughes. 1837.

At the session of the general assembly of North Carolina in 1833, it was enacted, that three commissioners be appointed by the governor, to collate, digest and revise all the public statute laws of the state. Reports were made by the commissioners to the governor, from time to time; and in 1836, the whole work was reported to the legislature, and was acted upon by that body. These two volumes, besides the laws of the state, contain many documents of great historical interest; among them the Mecklenburg Declaration of Independence. The mechanical execution of the work is exceedingly neat. It was printed in Boston, by Messrs Tuttle, Dennett & Chisholm.

THE ATTORNEY GENERAL'S ANNUAL REPORT. 1840.

By the Revised Statutes of Massachusetts, the attorney general is required to submit to the legislature, annually, a report of all the official business done by him, in which he is to include an abstract of the annual reports of the several district attorneys, with such observations and statements, as in his opinion the criminal jurisprudence, and the proper and economical administration of the criminal law of the commonwealth, shall warrant and require. The utility of this provision is obvious, and it is hardly necessary to remark, that the duty has been performed by the attorney general in a manner highly creditable to that able and efficient public officer, and to the commonwealth; every report being invested with an interest, by his remarks and suggestions, which mere statistical returns could never possess.

The statute of 1839, chapter 157, has materially altered and greatly enlarged the subject of these reports. The attorney general is now required to prepare from reports made to him by the district attorneys, the several police courts and the clerks of the judicial courts in the several counties, such abstracts and tabular statements as will show the nature and extent of crime in the commonwealth, the number of prosecutions and the results thereof, and the punishments awarded, particularly discriminating between those crimes which are perpetrated against the person and against the rights of property, the amount of costs arising in such prosecutions, with all such other information as may present full and complete statistics of crime, and the operation of criminal laws in Massachusetts.

In conformity to the provisions of this statute, the present report was submitted to the legislature at their last session. It has been prepared with great care and industry, and probably presents the best statement of criminal statistics ever made in this country. We shall refer to it again.

OBITUARY NOTICES.

Died in Boston, on the 3d of April, Henry C. Simonds, Esq., counsellor at law, aged 30.

Mr Simonds was graduated at Harvard University in 1831. He took a high rank as a scholar, and was much respected by all who had the pleasure of his acquaintance. On entering the profession he established himself in Boston, and at the time of his death was a successful practitioner, with the prospect before him of attaining the highest rewards of the legal profession. His talents were of a high order; his industry was very great, and his knowledge of the law was accurate and extensive. He was entirely devoted to his profession, and few practitioners brought to the service of their clients more devotion, perseverance and energy. Intense excitement in professional labor, and anxiety for success in a case unusually burdensome, acting upon a constitution naturally nervous, disturbed his reason, and apparently with no other sickness than mental derangement, he died. A fortnight sufficed to bring him to the tomb, and was all the time which was given to his family and friends from their first warning to prepare for their bereavement.

In Abbeville District, S. C., on the 7th of April, his excellency Patrick Noble, governor of South Carolina, aged 50.

Gov. Noble was a lawyer by profession, and was long a prominent member of the state legislature. In December, 1818, he succeeded to the chair of speaker of the house of representatives, on the transfer of Gen. Hayne from the speaker's chair to the office of attorney general of the state. Gov. Noble filled the office of speaker, by repeated re-elections, until December 1823, when for an interval, he left the hall of legislation for a private station. In November, 1833, having resumed his place in the legislature, he was again chosen speaker of the house, on the vacation of the chair by the election of the Hon. Henry L. Pinckney to Congress, and held it also for the succeeding term. In 1836, he was elected to the state senate, and on the first day of his first appearance in that body, was chosen its president; the Hon. Henry Deas, his predecessor in that office, having declined a re-election to the legislature. In December, 1838, he was elected governor of the state (succeeding Gov. Butler), with the general concurrence of all parties, and held the office at the time of his death. Gov. Noble was a man of amiable and irreproachable character, sound judgment and high intelligence, and filled the executive office with grace and dignity.

INTELLIGENCE AND MISCELLANY.

Maine. At a late term of the district court in Portland, the number of cases on the docket was 1300, of which 74 were criminal cases. Of the civil actions, 694 were new entries. Of the criminal cases, there were 34 new indictments, 2 cases appealed from the municipal court, and 38 continued indictments. Of the 34 new indictments, 13 were for larceny, 3 for assault, 2 for riots, and the remainder for violations of the license law, keeping bad roads, &c.

Vermont. In the case of George Holmes, which has created much excitement throughout the country, a final decision appears to have been made. Holmes was

charged by the authorities of Lower Canada with the crime of murder, and application was made to the governor of Vermont for his surrender, which application was complied with on the part of the governor, who ordered his return to the country whose laws it was alleged had been violated. The question of the governor's authority so to order, was tried by the supreme court of the state, and it was sustained. An appeal was taken to the supreme court of the United States, who dismissed the case for want of jurisdiction. The case was again brought before the supreme court of Vermont, and upon a review of the whole matter, the prisoner was discharged.

Massachusetts. Since the publication of our last number, the March term of the supreme judicial court has adjourned. Many cases of interest and importance were decided, reports of some of which may be found in the present number of the Law Reporter, and others will appear next month. The court will hold an adjourned session to dispose of the *remanents* on the law docket, in June. At the April term of the court of common pleas, judge Warren presiding, there was an unusual dispatch of business, and what is better, the business was well done. This court is now placed in a position, by the increase of its jurisdiction, which will render it of much more consideration than heretofore, and the character of the judges is such, as will place the court among the best tribunals in the country.

New York. In the city of New York, Mr Merritt, one of the police justices, has been charged with certain offences as an officer of justice, and his trial, not yet concluded, appears to excite considerable interest there. There are several charges, one of which is perjury; one for conniving at a felony, and one for permitting a felon to escape. The whole police system is exposed by this trial, and a most singular state of things is disclosed. The old saw of "set a rogue to catch a rogue," appears to have been acted upon with great zeal, but the mischief is, that some of the officers of justice appear from the evidence in this case, to have been themselves the greatest rogues of all. When this trial is completed we may allude to it again.

Georgia. A judicial decision in the supreme court of Georgia has put the Bank of Milledgeville (so styled commonly) into a somewhat embarrassing position. The law incorporates a bank by the name of the "Bank of Milledgeville, with banking and insurance privileges," and it was put into operation as the Bank of Milledgeville, simply, without the addition to the title of the other words. In a suit instituted by the bank against the indorsers of a promissory note, it was pleaded in abatement that the bank could only sue by its charter under the full title, by which, however, it has never transacted business, and the plea was held to be good. Another point decided by the court was, that the law as printed in the digest, made by authority of the state, is to be received in courts as the authentic record of an act, in preference to the enrolled manuscript on file in the office of the secretary of state.

Wisconsin. At Stockbridge, Wisconsin Territory, Isaac Littleman, a Stockbridge Indian, was recently tried for the murder of Peter Sherman, also of the same tribe. The trial was held before the "High Court of the Nation," without a jury, but with great order and decorum. Two of the tribe were appointed to conduct the case on the part of the nation, and the accused was permitted to choose another for his advocate, to whom a second was added by the court. The prisoner was convicted and sentenced to be hanged. The names of the three judges are Austin E. Quinney, Jacob Chicks, and

John H. Chicks, all Indians. The object of the murder was plunder, and it was the sale of some of the deceased's property that lead to the prisoner's detection. After his trial he made a confession, acknowledging that he had also murdered an old woman, some eight years ago.

MONTHLY LIST OF INSOLVENTS.

Our list of insolvents this month will be found to be accurate as far as it goes; but there may be some persons who have taken advantage of the law, whose names we have not been able to obtain for the present number.

It is reported that Joseph Willard, Esq., one of the masters in chancery for Suffolk, is to be appointed clerk of the supreme judicial court, in the place of Charles A. Parker, Esq., who intends to resign. Mr Willard's loss to the profession will be regretted very much by those practitioners who are interested in the administration of the insolvent law, as his place cannot be easily supplied; but his accurate business habits and conciliatory manners also peculiarly fit him for the station which, it is generally supposed, he is destined to fill. We are not aware, however, that the two offices are incompatible.

Insolvents.	*Occupation.*	*Place of Business.*	*Warrant issued.*
Bartlett, William	Gentleman,	Boston,	April 11.
Bates, Samuel	Stove dealer,	Boston,	May 8.
[*Leavitt & Bates,*			
Brown, Elijah	Stable-keeper,	Boston,	May 5.
Brown, Joseph M.	Merchant,	Boston,	April 7.
Carlton, Samuel	Grocer,	Boston,	April 1
Carnes, Joshua A.	Merchant,	Boston,	March 30.
Crane, George B.	Housewright,	Chelsea,	May 4.
[*Thomson & Crane.*			
Creighton, James	Trader,	Boston,	May 4.
Crisp, Antonio	Trader,	Boston,	April 21.
Comerford, David A.		Newburyport,	April 16.
Davis, John	Inn-keeper,	Newton,	March 31.
Fitz, Albert	Baker,	Chelsea,	May 2.
Garbett. Richard	Musician,	Boston,	April 8.
Hale, Joseph W.	Master mariner,	Newburyport,	April 30.
Hall, Parthenia	Widow,	Boston,	April 3.
Hovey, Solomon, jr.		Charlestown,	May 1.
Howard, Albert G.	Lumber-dealer,	Charlestown,	April 18.
Jenness, Job	Trader,	Boston,	
Leavitt, Charles T.	Stove-dealer,	Boston,	May 8.
[*Leavitt & Bates.*			
Manson, Ebenezer	Trader,	Cambridge,	May 2.
Merry, Robert D. C.	Merchant,	Boston,	April 14.
[*Howard & Merry.*			
Perry, Charles W. B.	Blacksmith,	Boston,	April 6.
Pratt, Robert, jr.	Shoe-dealer,	Boston,	May 4.
Pratt, Anthony S. }		Middleboro',	May 12.
Pratt, William }			
Pulsifer, Hobart	Trader,	Gloucester,	April 15
[*Pulsifer & Sawyer.*			
Rutter, Micah M.	Trader,	Wayland,	April 4.
Sawyer, James, jr.	Trader,	Gloucester,	April 15.
[*Pulsifer & Sawyer*			
Snow, Aaron R.	Tobacconist,	Boston,	May 1.
Scribner, James		Newbury,	April 14.
[*Scribner & Tarbox.*			
Seabury, Alexander H.	Merchant,	New Bedford,	April 29.
Tarbox, Andrew L.		Newbury,	April 14.
[*Scribner & Tarbox.*			
Taber, Francis, jr.		New Bedford,	May 5.
Very, Theodore K.	Blacksmith,	Boston,	March 30.

COLLECTANEA.

William L. Mackenzie and Rensselaer Van Rensselaer, who were convicted in New York last year of setting on foot an expedition against Canada, have been pardoned by the President.—In Charleston, S. C., John J. Lamb, aged 17, an assistant postmaster, has been sentenced to ten years imprisonment for stealing $260 from a letter. James Sanderlyn, for aiding and abetting him, was sentenced to fifteen years imprisonment.—Within the last two years, fines have been collected in the city of New York, by brigade courts martial, to the amount of $16,700; a very large part of which has been exhausted in the expenses attending said boards.—A colored man, convicted in Carroll county, Md., of stealing a half bushel of clover seed, was sentenced to seven years imprisonment.—It has been recently decided in the district court of the city of Philadelphia, that when an individual hires a horse or vehicle on the sabbath day, and an injury happens thereto, while so hired, no damages can be recovered by the proprietor. An action was recently brought in the secondaries court, London, by lady Lytton Bulwer, to recover damages for a libel inserted in the Court Journal. The damages were laid at £1,000, but the jury returned a verdict for only £50.—John J. Gilchrist, Esq., of Charlestown, N. H., has been appointed associate justice of the superior court of New Hampshire.—Moses Titcomb, Esq., of Brunswick, Me., has been appointed by the governor of Massachusetts, commissioner for the state of Maine, to take depositions, &c. to be used in the former state.—Mr D , a large importer of wines in Boston, was once drawn on a jury, and was occasionally absent. Judge H. G. Otis, then on the bench, was delayed several times by the juror's neglect, and had once to send for him. When he came in, the judge reprimanded him, and said, "Mr D·, I believe I must *fine* you a pipe of wine for your absences." "I beg your honor would save yourself that trouble," said Mr D., "for in my absence I have just *fined* one myself, and it is all ready for your honor's use at a fair price."—Jeffreys, when recorder, was retained in an action brought to recover the wages of some musicians who had officiated at a wedding party. He annoyed one of the plaintiffs with exclaiming frequently, "I say, fiddler; here, you fiddler!" Shortly afterwards this party called himself a "musicianer"; on which Jeffreys asked what difference there was between a "musicianer" and a fiddler? "As much, sir,'" replied the plaintiff, "as between a pair of bagpipes and a recorder."

TO READERS AND CORRESPONDENTS.

The present number of our magazine, it will be seen, appears in an enlarged and different form from those heretofore published. We believe the general appearance of the work is improved, and we doubt not the change will be generally acceptable to our readers.

The delay in the publication of the present number has arisen from circumstances in a measure beyond our control, but which will not be likely to occur again.

Our next number will be issued early in June. It will contain, among other things, a full report of the proceedings in Lady Lytton Bulwer's process before the sixth chamber of the police correctional tribunal of Paris.

The article in the present number on the early jurisprudence of Maine, is from the pen of one of the most accurate historical writers in the country. The second part of the article will be published in an early number.

The opinion of chief justice Gibson in the case of Bensil and others v. Chancillor, will appear next month.